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No. 87-855

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF FAYETTEVILLE, NORTH CAROLINA,
Petitioner

v.

HENRY Z. SPELL,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

PRELIMINARY STATEMENT

The City of Fayetteville will be referred to in this brief as the "Petitioner" or by name. Henry Z. Spell will be referred to as the "Respondent" or by name. References to the Petition for Writ of Certiorari will be designated "(Ptn. ——)." References to the appendix of the Petition for Writ of Certiorari will be designated "(App. ——)." References to the appendix of the Brief in opposition will be designated as "(Resp. App. ——)."

STATEMENT OF THE CASE

Respondent sets forth the salient facts of this case because Petitioner's statement of the case contains inaccuracies and is inadequate to fairly inform the Court of the context and circumstances which relate to the questions that Petitioner seeks to present for review.

A. Introductory Factual Background.

On November 19, 1983, Henry Zebulon Spell, a 27-year old male, was arrested and taken into custody by Fayetteville Police Officer Charles McDaniel for driving while

impaired and possession of Methaqualone. Thereafter, while Spell was handcuffed in the basement of the Law Enforcement Center, Officer McDaniel, apparently angered by Spell's inebriety, assaulted Spell by kneeing him in the testicles with such force that Spell's right testicle was ruptured and shattered to the extent that it had to be surgically removed. Due to a previous infection of his remaining testicle, the kneeing of Spell in the testicles rendered him permanently and irreversibly sterile.[1]

On January 26, 1984, this 42 U.S.C. § 1983 action was instituted by Respondent seeking substantial monetary damages against McDaniel, individually, and against the City of Fayetteville, the Petitioner herein, and certain of its officials named in their official capacities.[2]

Respondent pleaded that the officially named Defendants, or a combination thereof, were "persons" whose "edicts or acts" might "fairly be said to represent the official policy of the City" in law enforcement matters. Respondent also alleged that on the date of his injury, the Petitioner had a *de facto* policy, practice, custom and usuage which encouraged and allowed "aggressive, abusive and assaultive behavior . . . toward individual detainees and arrestees" which "proximately caused" McDaniel to injure Spell.[3]

At trial, Respondent presented twenty-six witnesses to prove the existence of the *de facto* policy which he contended proximately caused the assault by McDaniel. Respondent and an eyewitness to the assault testified that McDaniel assaulted Spell resulting in his injuries. Two

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[1] Pet. App. at 4a.

[2] Suit was instituted prior to this Court's decision in *Brandon v. Holt*, 469 U.S. 464 (1985), and at a time when the state of the law at to the proper means of joining a municipality in a Section 1983 action was in flux. Out of an abundance of caution, Respondent named the City as a party and also named, in their official capacity, those City officials he contended were responsible for the policies that caused his injury.

[3] Pet. App. at 21a.

sheriff's deputies corroborated Spell's complaints of pain and his account of the incident with McDaniel. Respondent's criminal lawyer and his treating physicians testified as to the physical manifestations of his injury and his resulting sterility.

B. The Policymaking Authority of the Chief of Police and his Command Officers.

Seven residents of the City of Fayetteville, in addition to eight present and former police officers, an assistant district attorney, an expert in police civil liability, and a former police legal advisor, all testifed in support of Respondent's allegations of a widespread and persistent *de facto* policy, practice and custom within the Department that authorized and encouraged activities of the very kind which resulted in Respondent's injury. Several officers testified that the use of excessive and unwarranted force by Fayetteville police officers was widespread, persistent and was condoned and encouraged, and in some instances practiced personally by Chief Dixon and the officially named Defendant command officers. They described a repeated pattern of police brutality, excessive force, and other misconduct; they also testified that they had seen rookies being trained how to knee persons in the groin and that McDaniel's kneeing of Respondent was consistent with the training he had received at the Fayetteville Police Academy established by Chief Dixon. They testified that Fayetteville police officers were forbidden by the supervisory Defendants from interrupting or stopping such incidents, and that they were sanctioned when they attempted to register their protests. A twenty-five year veteran of the Police Department testified that the Chief's philosophy was to "kick ass and takes names" and that he wanted "supercops" tougher than even the GIs at nearby Ft. Bragg, and had established his own Police Academy to screen out women and non-aggressive male candidates.[4]

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[4] Pet. App. at 24a.

A former legal advisor for the Police Department testified that disciplinary procedures had broken down within the Department under the Chief's direction, that the Chief advocated the use of excessive force, and refused to allow officers who used excessive force to be disciplined. An Assistant District Attorney testified that in his opinion the Police Department had, for an extended period of time, condoned and encouraged the use of excessive force on arrestees.[5]

Respondent's expert in police administration offered extensive illustrative evidence of reports of Internal Affairs investigations of police misconduct. These documents led the expert to conclude in a pre-trial affidavit:

> What we have here is a dismal and depressing portrait of well-patterned and flagrant police physical abuse. This abuse was known to, condoned by, and in some cases, encouraged by supervisory officials and on numerous occasions such conduct was clearly covered up.

The evidence included instance after instance of police brutality and excessive force, including the beating of a 14-year old child while he was handcuffed and lying on the ground in the presence of his mother and grandmother, the kneeing of a man in his testicles while he was lying on the ground being treated by a medic, persons being pulled from their automobiles and beaten about the head and face while being arrested and handcuffed, and police officers sticking pistol barrels in people's mouths or faces and cocking the hammer back and threatening "to blow their fucking heads off". The testimonial evidence of police brutality, cover-up and misconduct was overwhelming, and with reference to the documentary evidence, the trial court said:

> Finally, the instances of confirmed and uncontradicted misconduct demonstrated in Defendants' own internal affairs documents was, in the court's opinion, devastating to defendant's case.[6]

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[5] Pet. App. at 24a-25a.

[6] Pet. App. at 73a.

Petitioner presented its own expert in police administration who furnished further positive proof that the responsibility for the establishment of policy in the Police Department lay with Chief Dixon and was implemented by him and his "Command officers".[7]

Additionally, *Petitioner* introduced into evidence *its own* officially adopted job description for the Chief of Police and the other officially named police Defendants. These City records clearly set forth that the Police Chief possessed the general authority to set policy for police matters, which he shared with his command officers.[8]

Like many municipalities in this country, the City of Fayetteville had established by its charter a Civil Service Commission which was set up to reduce the influence of politics in hiring, promotion and discharge of City employees. As such, its primary role was to develop a standardized civil service test for applicants for employment and to do appellate review of the few instances where the Chief of Police had imposed discipline so as to prevent the discipline from being politically motivated. The Civil Service Commission at no time had authority to institute investigations of police misbehavior or to institute disciplinary proceedings against members of the Police Department. That authority rested solely with the Police Chief.

Since the adoption of the Council-Manager form of government in 1949, the City of Fayetteville, through its City Council, hired all Police Chiefs and police officers, and funded the entire activities of the Police Department. The Civil Service Commission had no power of taxation and it received its limited funding from the City Council.

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[7] Pet. App. at 26a.

[8] Pet. App. at 27a.

C. First Trial Jury Instructions and F.R.C.P. 51.

Prior to instruction, each party filed proposed written instructions with the court. The court then held a charge conference and presented each party with a copy of its proposed written instructions. Each party then filed written objections to the instructions, and after the court instructed the jury, each party was offered an additional opportunity in open court to register further objections under Rule 51.

Petitioner was offered and seized every available opportunity to ensure that the jury was instructed that, in order to hold the City liable, it was required to determine that the "conduct of (t)he City of Fayetteville, through its official policymakers, *directly* and *proximately* caused" the Respondent to be deprived of his constitutional rights. It did this in its requested jury instruction on causation, in its request that the court define proximate cause according to *Federal Jury Practice and Instructions*, Devitt and Blackmar, 3rd Edition (Proximate Cause, Sec. 80.18), and in further requesting an instruction that the policy in question must have resulted from the officially named Defendant's "gross negligence or reckless disregard" of the constitutional rights of the Plaintiff.

At trial the jury was, in fact, instructed on more than one occasion, that proximate cause was the controlling causation standard.[9]

As to custom and *de facto* policy, the court then charged the jury that "... informal actions ... [which] reflect a *general and persistent pattern and practice*, may be so *common* and *well-settled* as to constitute a custom or practice of official misconduct . . . that . . . fairly represent[ed] a municipal policy existing in fact." [10] It then instructed that "a single isolated act" of misconduct was insufficient to establish the policy.[11]

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[9] Pet. App. at 147a, 150a.

[10] *Id.* (Emphasis added).

[11] Pet. App. at 151a.

The jury was told that in order to find an officially named Defendant liable, it had to determine that the officially named Defendant was a policymaker in the sense that he "developed, caused or maintained such policy . . . or in the alternative . . . was aware of or reasonably should have been aware . . . of such policy . . . and . . . had the authority to rectify, nullify, or render ineffective the policy, but failed to act within the scope of his authority to do so." [12]

At Petitioner's request, the jury was instructed that before imposing liability on the official, the jury must find that the action or failure to act amounted to gross negligence or deliberate indifference to the constitutional rights of others.[13]

Finally, the court charged that the jury must find that the action of the officially named Defendant "in establishing or causing the existence of such policy, practice, custom or in failing to nullify or render it ineffective, set in motion a series of acts by others which the representative Defendant reasonably should have foreseen would cause his subordinates, including the Defendant McDaniel, to, in fact, inflict constitutional injury. . . ." He then referred the jury to his earlier definition of the term "proximate cause" which stated:

> (I)njury or damage is proximately caused by an act or failure to act whenever it appears from the evidence that the act or failure to act in the natural and probable course of events brought about the injury or damage and the injury or damage was of such a character that an ordinary prudent person could reasonably foresee it as likely to occur.[14]

At no time did the Petitioner object to any of the instructions it now seeks to challenge, nor to any of the instructions hereinabove set forth. Further, at the conclusion of the instructions, when offered the opportunity

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[12] Pet. App. at 149a.

[13] *Id.*

[14] *Id.*

to register further objections, Petitioner did not object to any instruction it now seeks to challenge in its Petition.

This failure to object under Rule 51 was presented to the Fourth Circuit panel and was recognized in its opinion.[15]

D. Second Trial.

At the conclusion of the first trial, the jury returned a verdict for the Respondent and assessed damages against McDaniel and against all officially named Defendants who were members of the Police Department, including the Chief of Police, in the sum of $1,000.00. McDaniel and the Petitioner both filed motions for a new trial on all issues, and Respondent filed a motion for a new trial on the issue of damages only. In its motion, the Petitioner argued, ironically, that the jury "was so incensed by its actions that the jury 'jumped over' the issue of McDaniel's liability to get at them." [16] The trial court received briefing and held oral argument on the question. The trial court concluded that "evidence of liability was substantial and with regard to some defendants overwhelming",[17] the "defense appeared to be based upon pure speculation and conjecture",[18] "the record contained[ed] absolutely no indicia of a compromise other than the low amount of damages",[19] and "the issues of liability and damages [were] distinct and separable" [20] and under authority of this Court's opinion in *Gasoline Product Co. v. Champlin Co.*, 283 U.S. 494 (1931), and decisions from the Fourth, Sixth and Eleventh Circuits, ordered a new trial limited to the issue of compensatory damages.

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[15] Pet. App. at 29a.

[16] Pet. App. at 79a.

[17] *Id.*

[18] Pet. App. at 69a.

[19] Pet. App. at 82a.

[20] *Id.*

Petitioner is well aware that under the standard procedure of the United States District Court for the Eastern District of North Carolina, cases are assigned randomly to a particular judge for all proceedings, and when the case is ready for trial, it is scheduled before the judge assigned to the case at the place he is then sitting. In this case, the next term for the District Judge assigned to this case was scheduled in Wilmington for April of 1985, and the case was thus set for retrial in that City. If the Petitioner felt prejudiced by this procedure, it did not voice its concern, for no objection was ever registered.

At the first trial, the Petitioner had denied both the occurrence of the assault and the existence of the alleged policy and custom. Throughout the trial Petitioner repeatedly emphasized the fact that Respondent had been arrested for impaired driving and possession of narcotics in an attempt to attack his credibility. In final argument, defense counsel described Respondent as being "trash", "scum", "garbage", "vermin", and "the lead rat pulling a garbage wagon."

Following the first trial, and during the hearing on the motions for a new trial submitted by all parties, the City's counsel, Robert Cogswell, inquired what findings of fact from the first trial would be treated as conclusive if the court granted Respondent's motion for a new trial limited to the issue of compensatory damages. The Court responded that the City would be precluded from again arguing that McDaniel was not responsible for Spell's injury and claiming that the injury occurred prior to Spell's arrest at the creek bank.

Nevertheless, at the second pre-trial conference, Petitioner persisted in advancing the very contentions which the court had determined would be excluded from consideration in the second trial. Respondent moved to strike these contentions under Rule 11 and moved for sanctions. The court found Petitioner's contentions "so unreasonable and unjustified that a finding of frivolity

[was] mandated. Either the Defendants have deliberately embarked upon the path of disregarding reality or the [contentions] were made with reckless disregard for their continued validity and reasonableness." Sanctions were imposed which included striking the contentions and awarding attorneys' fees. This action was affirmed by the Fourth Circuit without comment.

At the second trial, the Wilmington jury returned a verdict against McDaniel, individually, and against the City, in the sum of $900,000.

E. The Decision of the Fourth Circuit.

The unanimous panel of the Fourth Circuit affirmed. In its opinion, the court initially reviewed all relevant decisions of this Court concerning the scope of municipal liability under 42 U.S.C. § 1983 and concluded that "the substantive requirements for establishing municipal liability are stringent indeed." [21]

After an extensive review of all proceedings below, the unanimous panel found the evidence sufficient to support findings that the Chief of Police "was an authorized policymaker for the City of Fayetteville in matters of law enforcement"; that this authority was, by specific authorization of the City, exercised jointly by the Chief and, among others, the officially named police Defendants; and that the injury to Spell was "in specific accord with and in furtherance of" and a "direct result" of the policy, custom and usage of the Petitioner.[22]

As to jury instructions, the court noted "a substantial question [existed] whether the City objected to the jury instructions at trial and with sufficient specificity to preserve any right to challenge them on appeal." [23] Nevertheless, the court carried out an extensive review of the instructions *sua sponte* and concluded that the instruc-

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[21] Pet. App. at 20a.

[22] Pet. App. at 27a-29a.

[23] Pet. App. at 29a.

tions were "rather remarkable for their overall accuracy and prescience in explaining what at the time was, and still remains, an evolving and difficult body of legal doctrine." [24]

Specifically, the reviewing court was satisfied that "the instructions imposed sufficiently stringent substantive standards at the critical points . . . ; identification of the specific policy or custom claimed . . . ; fair attribution of the policy or custom; and a requisite degree of fault to the City, (and) establishment of a sufficiently close causal connection between policy or custom and specific violation.[25]

Finally, the court expressed "no doubt" that the jury was "sufficiently informed" that municipal liability could only be imposed if it was determined that law enforcement officers to whom the City delegated policymaking authority had exercised their authority in such manner "that the police had been given reasonably to believe that they were generally free to use excessive force in any police-citizen encounter without fear of sanction, and that as a direct result of this informal policy or custom," McDaniel had unjustifiably assaulted Spell.[26]

REASONS FOR DENYING THE WRIT

I. MUNICIPAL LIABILITY WAS IMPOSED BECAUSE OF THE ACTIONS OF THE SUPERVISORY DEFENDANTS IN CREATING AND IMPLEMENTING A *DE FACTO* POLICY, AND NOT ON THE THEORY OF *RESPONDEAT SUPERIOR.*

Petitioner was not held liable solely on the basis of the findings against the supervisory defendants as Petitioner's first question would suggest, but instead liability was imposed because:

(a) a *de facto* policy and custom of police brutality and physical violence existed, and

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[24] Pet. App. at 29a.

[25] Pet. App. at 37a.

[26] Pet. App. at 37a-38a.

(b) said policy and custom was authorized, developed, formulated, condoned, and implemented by Chief of Police Dixon, who had the final authority to prescribe policy in the Police Department, and

(c) said policy was developed, formulated, condoned, approved, and implemented by the Supervisory Defendants who had the authority and ability to stop and prevent the implementation of said policy, but willfully refused to do so, and

(d) as a result of said policy, McDaniel violated Respondent's constitutional rights and injured him.

In *Monell v. Dept. of Soc. Serv.*, 436 U.S. 658 (1978), this Court held that a municipality or other local governing units can be successfully held liable under Sec. 1983 where

> the action that is alleged to be unconstitutional implements or executes a policy, statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers [or where] . . . constitutional deprivations [are] visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels.

436 U.S. at 690-691. The unconstitutional action must be fairly attributable to the municipality, *Spell v. McDaniel*, (See Ptn. App. at 64a), thereby assuring that "municipal liability is limited to action for which the municipality is actually responsible." *Pembaur v. City of Cincinnati*, 465 U.S. 469, 106 S.Ct. 1292, 1298 (1986). Simply stated, Sec. 1983 requires a showing that the unconstitutional conduct occurred pursuant to the "official policy" of the municipality. *Pembaur*, 106 S. Ct. at 1298.

The initial hurdle in imposing municipal liability in a Sec. 1983 action is identifying the "official policy". Petitioner argues that "official policy" can be created only by "official policymakers," and these "official policymakers" *could not*, as a matter of law, and *did not*, under the facts of this case, delegate their authority to create policy. (Ptn. at 19). Specifically, Petitioner contends that

the City Manager, John P. Smith,[27] was a source of "official policy," [28] and that Smith did not promulgate or condone the police department's abusive practices. (Ptn. at 3-4). Petitioner maintains that Smith, on the contrary, "initiated a series of positive, significant measures," (Ptn. at 15), and "as part of his effort to improve the police department," undertook investigative and disciplinary proceedings. (Ptn. at 3).

Such representation by the Petitioner is totally inaccurate. The true facts are that the City Manager's investigations concluded that all complaints against Chief Dixon were unfounded. Additionally, those line officers who made the complaints were publicly chastised by the City Manager for going outside the chain of command in making the complaints, and he made an entry of this reprimand in each officer's permanent record. Dixon and Holman later retired on full pension; Johnson has been promoted to Captain, and Command Sargent Dalton and Patrolman McDaniel are still on the Police Force. Furthermore, in spite of the evidence developed at trial, no disciplinary action was ever taken against any of the defendants in this case and apparently, no such action will ever be taken. The current Chief of Police of the City of Fayetteville has publicly stated recently that he will take no disciplinary action against the officers involved in the Spell matter, and that since the verdict was rendered by "civil" rather than a "criminal" jury, he feels fully justified in ignoring the verdict.

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[27] Petitioner now apparently admits that the City had a policy, but that the policy was not carried out by the police department. This is contrary to the Petitioner's argument at trial and before the court below, that there was *no* policy and/or custom, and for that matter *no* assault.

[28] Petitioner also concedes that Chief Dixon "could lay claim to *Monell* final or ultimate authority," (Ptn. at 21), thereby *conceding* that Dixon's "kick ass and take names" policy was "official policy". Thus, in that the finding of liability of the Chief of Police in his official capacity rendered the Petitioner liable, see *Brandon v. Holt*, 469 U.S. 464 (1985), Respondent contends that the issue herein presented is moot.

Petitioner's argument in this Court as to the identity of the "policymakers" is wholly inconsistent with Petitioner's position at trial. At the initial pre-trial and trial, the City and the other defendants contended and offered evidence to show that Chief Dixon was ultimately responsible for policy in the Police Department, and that City Manager Smith was *not* a policymaker in law enforcement matters and was *unaware* of any problems within the Fayetteville Police Department. Based upon this argument, the jury did not hold Smith liable.

Before the Fourth Circuit, however, the City conveniently modified its position and claimed that Smith and the Civil Service Commission (CSC) were the *only* policymakers in Fayetteville. According to the Petitioner's argument, the only policymaker was Smith (the CSC had not been sued), and since no verdict was rendered against Smith below, the imposition of municipal liability was improper.

Now, in its petition before this Court, the Petitioner argues that City Manager Smith "interrupt[ed] the acquiescence necessary to create a policy or custom and . . . eliminate[d] any causal connection between past acts or omissions of Chief Dixon and the assaults on . . . Spell." (Pet. p. 15)

The crux of the first question raised by the Petitioner therefore is whether a finding of liability against the Petitioner can be based on the acts or omissions of persons subordinate to Smith or Dixon acting in their official capacity. The Petitioner suggests that the finding of the policy and/or custom of its police officers using excessive force on arrestees was not attributable to City policymakers, and therefore, could not be used to impose municipal liability. Given the Petitioner's concession that Chief Dixon was a policymaker, the verdict against Dixon in his official capacity suffices to impose municipal liability, and Petitioner's first question is now moot. *See Brandon v. Holt*, 469 U.S. 464 (1985). Nevertheless, Respondent will address the issue of the supervisory police officials as policymakers.

Official policy can be created affirmatively or by condonation by either the municipality's policymakers or by those to whom policymaking authority has been delegated. *See Pembaur*, 106 S.Ct. 1300; *Spell v. McDaniel* (Ptn. App. at 27a); *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984); *Bennett v. Slidell*, 728 F.2d 762, 769 (5th Cir. 1984).

"[W]hen execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . the government as an entity is responsible under § 1983." *Monell*, 436 U.S. at 694.

The courts below found evidence sufficient to establish *both* a policy and a custom attributable to the Petitioner which, when implemented by police officer McDaniel, deprived Spell of his constitutional rights.

The proof that Dalton, Holman and Johnson "along with Chief Dixon" were makers of *de facto* policy by virtue of delegation of policymaking authority and the implementation of the policy included the testimony of the Petitioner's own expert, Glen Murphy, who testified as follows:

> Q: Who makes policy for a police department?
>
> A: Well, let me define what I mean by policy. Policy is the broad overall generalities or guidelines of where a department is going. Policy is established by the chief of police, and in this instance here would be with the concurrence or the acquiescence of the city manager, perhaps. But, the chief of police has the responsibility for overall guidance—the policy. Procedure, which is how that policy is implemented, *is the responsibility of the chief of police to develop in concert with command officers and supervisory officers.*

(Emphasis added). The job descriptions of these defendants in their official capacity included policymaking responsibilities for such things as the conduct, efficiency and performance of the men of their command and the

enforcement of rules, regulations and orders applicable thereto (Pet. App. at 27a).

The Respondent's evidence at trial clearly established that the Petitioner's policies and customs which encouraged such incidents as the assault on Spell were persistent, widespread and ran from the top to the bottom of the police department; and that Dalton, Holman and Johnson, willingly developed and implemented procedures to carry out these policies and customs, and therefore, were responsible jointly along with Dixon for their continued implementation.

The fact that on paper Smith and/or Dixon may have had final decision-making authority cannot insulate the makers of *de facto* policy from liability:

> [I]f a higher official has the authority to overrule a decision, but as a practical matter never does so, the decision-maker may represent the effective final authority on the question.

Bowen v. Watkins, 669 F.2d 979, 989 (5th Cir. 1982).

Policy may be authorized by a municipal official who has either position or *de facto* power. *See, e.g., Rookard v. Health and Hospitals Corp.*, 710 F.2d 41 (2nd Cir. 1983); *Bowen*, 669 F.2d at 989; *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980). In fact, this Court recently refused to grant a writ of certiorari in a case where arguments similar to those of Petitioner were advanced. *See Harris v. City of Pagedale*, 821 F.2d 499 (8th Cir. 1987), *cert. denied*, —— U.S. ——, 56 U.S.L.W. 3403 (1987).

A reading of the cases relied upon by the City reveals no case that supports its position.

Clay v. Conlee, 815 F.2d 1164 (8th Cir. 1987), concerned the victim of a rape who identified Clay, a member of the Arkansas State Police, as her assailant. Within a few hours following his arrest, it was discovered that he was misidentified. Clay thereafter filed an action under § 1983 against Sheriff Conlee in both his individual and official capacity. Clay alleged that Conlee's

subordinates, the arresting officers, lacked probable cause to arrest him, and thereby violated his constitutional rights. The jury returned a verdict in favor of Conlee in his individual capacity, but found against him in his official capacity. The Eighth Circuit noted that both parties seemed to have equated supervisory liability with the liability of a Sheriff in his official capacity. The Court thereafter explained the difference in the two types of actions. The acts of subordinates could be used to impose liability against their supervisor in his *individual capacity*, for his "own culpable action or inaction in the training, supervisor, or control of his subordinates." 815 F.2d at 1170. "A § 1983 action against a government official in his *official capacity*, in contrast, is tantamount to action directly against the public entity of which the official is an agent," *id.* (emphasis added), and it requires a policy or custom being carried out which causes the constitutional violation. In that the trial court failed to instruct the jury that, in order to impose liability against Conlee in his official capacity, it had to first find a municipal policy or custom, "it was insufficient for that reason alone to impose liability against Conlee in his official capacity." *Id.* In the case *sub judice*, the Fourth Circuit found that the trial court sufficiently informed the jury that before it could find liability on the part of the City, it must first find that there was a policy or custom which resulted in McDaniel's assault on Respondent. (Pet. App. at 37a-38a).

The City cites *Bennett v. City of Slidell*, 728 F.2d 762 (5th Cir. 1984), to stand for the proposition that the Fifth Circuit "interpreted the 'edicts or acts' language in *Monell* to exclude liability as a result of acts of a city's employees 'whatever their rank.'" (Ptn. at 20). What is omitted from that quote, however, is the Court's final phrase of the quoted sentence, "unless in accord with city policy." *Bennett*, 728 F.2d at 769. The following sentence of that opinion places the Court's ruling in the proper context: "Liability must rest on official policy, meaning the city government's policy and not the policy of an individual official." *Id.*

The issue at hand revolves around what is official policy rather than who is a policymaker. If the inquiry were simply whether the act or omission in question was that of a policymaker, then *respondeat superior* would be the standard for finding municipal liability under § 1983, which is contrary to *Monell* and its progeny.

The present case is distinguishable from *Webster v. City of Houston*, 735 F.2d 838 (5th Cir. 1984), because here, there was evidence presented of the policy and procedure-making roles of *all* supervisory defendants, and the jury could not return a verdict against supervisory defendants unless it determined that *each* such supervisory defendant developed or maintained the policy, or served in a capacity where he could have corrected the policy but because of wilful indifference, failed to do so. In *Webster* "[t]here was no proof . . . whatsoever, that any police officer subordinate to the Chief [of Police] even possibly could have occupied the role of a city policymaker." 735 F.2d at 862.

The Petitioner states that the Fourth Circuit contemplated "a shell game through the use of unsupported propositions such as 'shared responsibility' or the mystic incantation of the word 'delegated' [which] equates decisions of line sergeants in the police department with those possessing policymaking powers." (Ptn. at 19). Respondent respectfully submits that the only shell game found in this case is the one which the City has played with the courts in "designating" its policymaker(s).

II. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY TO CONSIDER "TACIT ENCOURAGEMENT" IN DETERMINING THE EXISTENCE OF A *DE FACTO* POLICY.

Petitioner incorrectly asserts that the lower court approved a jury instruction which directed the jury that a finding of "tacit encouragement" established a sufficient causal link between the City's *de facto* policy and the constitutional injury to impose municipal liability. (Ptn. at 21). The City totally misstates or fails to understand

the "tacit encouragement" term found in *Avery v. County of Burke*, 660 F.2d 111 (4th Cir. 1981), and *Wellington v. Daniels*, 717 F.2d 932 (4th Cir. 1983), as well as the application of that language when used by the trial and appellate court in the case at bar.

The jury in the case at bar was instructed to consider the Petitioner's "tacit authorization" of police department practices in determining the issue of whether there was a *municipal policy*. The instruction was clearly not offered as the required *causal* deprivation. The jury was instructed as follows:

> Cities like the defendant City of Fayetteville are equally liable for what the law considers de facto or in fact practices, customs or policies caused, maintained, *tacitly encouraged* or condoned by their supervisory personnnel and *which proximately caused a constitutional deprivation*. This is so even though these policies, practices and customs have at no time received formal approval through the local government's decision making channels.
>
> Thus, informal actions, if they reflect a general and persistent pattern in practice, may be so common and well settled as to constitute a custom or pattern of official misconduct, that such misconduct may then fairly be said to represent a municipal policy existing in fact. That is to say a de facto policy.
>
> If such a de facto policy expressly or *tacitly encourages* conduct depriving individuals of their constitutional rights, it is sufficient to impose liability upon the city's responsible supervisory personnel and through them, upon the defendant city itself.
>
> Members of the Jury, the term *tacit encouragement*—by the term *tacit encouragement*, the law means encouragement expressed or conveyed without words or speech. That is, encouragement implied or inferred from the actions or inactions of a person of authority. In this regard, you should keep in mind that a single isolated act is insufficient to establish a de facto policy. By the same token, the citizens of a municipality do not have to endure an

> overly widespread or unduly prolonged pattern of past misconduct before municipal liability can be found under 42 United States Code, Section 1983.
>
> In addition, Members of the Jury, a *de facto* policy can be inferred from the city's omissions as well as from its affirmative acts. If you find these omissions constitute *tacit authorization* of or deliberate indifference to constitutional injuries. More specifically, I instruct you that where a senior person in a police department has knowledge of a pattern of constitutionally offensive acts by his subordinates, but fails to take remedial steps within the scope of his authority, the city may be held liable for a subsequent violation, if you find the supervisory official's actions or inactions amounted to a deliberate indifference or *tacit authorization* of the offensive acts.
>
> . . . .

(Resp. App. at 12a-13a.) (Emphasis added).

This instruction was in accordance with the guidelines of cases from the Fourth Circuit, and set forth how tacit condonation by policymakers can create policy. *See also Harris v. City of Pagedale*, 821 F.2d 499, 504 (8th Cir. 1987), *cert. denied*, —— U.S. ——, 56 U.S.L.W. 3403 (1987). The jury was then instructed that upon a finding of *de facto* policy, it must go further and determine if there was a direct causal link between the policy and the injury. The jury was properly instructed that the causal link was established only if the jury found that the injury to Spell "proximately resulted from" *de facto* policies, practices, customs or procedures caused or maintained by the City of Fayetteville. (Resp. App. at 13a). *See Harris*, 821 F.2d at 508. Thus, only upon a finding of *both de facto* policy *and* the direct causal link, could liability be imposed.

The authority on which Petitioner relies to support its position before this Court is totally inapposite to the case at bar. The cases cited by petitioner again address the question of whether a *policy* exists, not the issue of causation. Furthermore, they are "single incident" cases

which have no application in cases, like the one at bar, involving "custom" or *de facto* policy.

As the United States Court of Appeals for the Fifth Circuit has recognized:

> The issue in *Tuttle* was specifically limited to the question of '[w]hether a single isolated incident of the use of excessive force by a police officer establishes an official policy or practice of a municipality sufficient to render the municipality liable for damages under 42 U.S.C. § 1983.'

Rymer v. Davis, 775 F.2d 756 (6th Cir. 1985), *cert. denied*, —— S.Ct. —— (1987).

In the *City of Oklahoma v. Tuttle*, 471 U.S. 808, 820, 105 S.Ct. 2427, 2434 (1985), Petitioner's "leading authority," this Court plainly stated:

> Respondent did not claim in the District Court that Oklahoma City had a 'custom' or 'policy' of authorizing its police force to use excessive force in the apprehension of suspected criminals, and the jury was not instructed on that theory of municipal liability.

Finally, Petitioner asserts that the concern which Justice O'Connor expressed in her dissent to the Court's dismissal of a writ as improvidently granted in *City of Springfield v. Kibbe*, 107 S.Ct. 1114 (1987), should justify the issuance of a writ in this case. *Kibbe* involved the question of "whether a city can be held liable under 42 U.S.C. § 1983 for providing inadequate police training, and, if so, what standard should govern the imposition." 107 S.Ct. at 1116. Justice O'Connor warned that mere allegations of inadequate, or deficit training, coupled with isolated instances of constitutional deprivation, were insufficient to impose Sec. 1983 liability, in the absence of a nexus between the two. 107 S.Ct. at 1121-1122. *See also Tuttle*, 471 U.S. at 804. The concern expressed by Justice O'Connor in *Kibbe* has no application in the instant case because the facts in *Kibbe* (and *Tuttle*) are so different from the case at bar. In this case, the evidence of a widespread and persistent policy of

police misconduct and cover-up in the Fayetteville Police Department was "overwhelming", and Petitioner's reliance upon "single incident" cases offers no support for its position. In "single incident" cases, naturally there is a higher burden of proof required to connect the single incident and the municipal policy, and the instruction must be tailored to explain this burden. The Petitioner has taken the burden required for "a single incident" case, and is trying to assert that it should apply where the *de facto* policy is widespread and persistent. Such an assertion misinterprets the Respondent's burden in this case. It boils down to the difference between a training program which is deficient because of a lack of instruction as opposed to an affirmative program which advocates the use of excessive force. The evidence in this case amply supports the jury's finding of a widespread policy and custom that encouraged the use of excessive force without fear of sanction as well as a direct causal connection between such policy and custom and the Respondent's injury. The court below recognized this in their opinion, and its decision does not require this Court's attention.

Even assuming *arguendo* that Petitioner's statement accurately represents the law or the facts, the argument has not been preserved for appeal in that the City did not object to the instruction at trial. Furthermore, the City itself requested the causation instructions very similar to the "tacit authorization" language it now seeks to attack, and the City itself approved "proximate cause" as the appropriate nexus to be used.

III. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING *DE FACTO* POLICY AND CUSTOM AND USAGE IN 42 U.S.C. § 1983.

As with the other instructions which Petitioner seeks to present as erroneous to this Court, the instruction explaining the "custom or usage" requirement under § 1983 drew no objection from Petitioner at trial, and is therefore waived. In any event, the instruction is supported by precedent from this Court and that of the court

below. *See Wellington*, 717 F.2d 756 and *Avery*, 660 F.2d 111.

The opinion rendered by the court below meets Respondent's argument as follows:

> Finally, the City challenges the court's instructions on the alternative theory of "condoned custom." Essentially, the complaint is that the court did not adequately explain that only a known, widespread "custom or usage" of unconstitutional conduct could be attributed, by condonation of policymaking officials, to the City. Specifically, the City points to a passage from the instructions in which the court instructed that "the citizens of a municipality do not have to endure an overly widespread or unduly prolonged pattern of past misconduct before municipal liability can be found." Again, we find no reversible error in this particular portion of the instructions.
>
> The critical passage challenged simply followed up the court's immediately preceding instruction that what must be found was "a general and persistent pattern in practice . . . so common and well settled as to constitute a custom or pattern of official misconduct," which was then elaborated by the critical admonition that "a single isolated act is insufficient to establish a de facto policy." In this immediate context as well as in the more general context, this passage was therefore a quite acceptable counterpoise, using the qualifiers "overly" and "unduly," to the basic proposition that only practices "general and persistent," "common and well settled," could constitute condoned custom or usage.

(Pet. App. 35a-36a.)

As recognized by this Court in *Tuttle* and by Justice O'Connor in her *Kibbe* dissent, there are certain cases in which a "single incident" is sufficient to establish a policy so long as there is the appropriate nexus. *Tuttle* and *Kibbe* were decided after the trial of this action, and the standard set by the trial court in this case was more stringent than that elaborated in *Tuttle* and *Kibbe*. The burden of the Plaintiff under the circumstances set forth

in *Tuttle* and *Kibbe* is not controlling here, however, because this is not a single incident case, but one in which the evidence established a history of widespread and persistent misconduct.

The Petitioner responds that this Court in both *Adickes v. Kress & Co.*, 398 U.S. 144 (1969) and *Monell* defined custom or usage as covering " 'persistent and widespread' 'permanent and well settled' practices which have been 'deeply embedded traditional ways of carrying out . . . policy.' " (Ptn. at 24). Petitioner's quotations from *Adickes*, when examined in context, however, do not even pertain to the standard for custom or usage. This Court used the quoted passages in explaining that Congress had included the "custom and usage" language in Sec. 1983 "because of the *persistent* and *widespread discriminatory practices* of state officials in some areas of the post-bellum South." *Adickes*, 398 U.S. at 167, *Monell*, 436 U.S. at 691.

The Petitioner either does not understand or refuses to acknowledge that a *de facto* policy (or "custom and usage") is as legitimate a basis for § 1983 liability as an officially stated policy. The City fails to distinguish between the two distinct premises of liability.

In *Monell* this Court recognized and addressed an official governmental policy which was unconstitutional on its face, overruling its earlier decision in *Monroe v. Pape*, 365 U.S. 167 (1961). By contrast, a *de facto* policy or practice which constitutes "custom or usage" is one in which there is such a widespread or persistent course of action which, although not authorized by written law, is so permanent and well-settled as to have the force of law. Such a policy may be condoned by affirmative consent or by deliberate indifference or wilful disregard to a consistent course of action.

Justice Frankfurter in *Nashville, C. & St. L. R. Co. v. Browning*, 310 U.S. 362, 369 (1940) explained the distinction between "policy" and "*de facto* policy or custom and usage" when he stated:

> It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law . . . Deeply embedded traditional ways of carrying out state policy . . . are often tougher than the dead words of the written test.

Because the policy of the Petitioner in this case lay not in the spoken, but rather the unspoken directives of its officials, it was a policy that was very "tough" indeed. It was a policy of silent, hidden encouragement, of a wink or a nod of approval, a sidelong glance or a turned back . . . a willingness not to look or see that which was apparent. So that when blame must be assigned, as now it must, those who possessed the authority to stamp out the wrongdoing plead unawareness, or say that the problem was not brought to their attention. They place the blame on their subordinates who carried out the unconstitutional act while claiming that they should go forward untouched, shrouded in the "dead words" of their official and constitutional policy.

IV. PETITIONER HAS WAIVED THE RIGHT TO CHALLENGE THE JURY INSTRUCTIONS ON DAMAGES UNDER 42 U.S.C. § 1983 BY FAILING TO OBJECT AND BY REQUESTING THE INSTRUCTIONS; MOREOVER, THE INSTRUCTIONS ARE CONSISTENT WITH *MEMPHIS COMMUNITY SCHOOL DIST. v. STACHURA.*

Petitioner contends that a Writ should be granted in this case because the jury instructions given at the second trial on the issue of damages conflict with *Memphis Community School Dist. v. Stachura*, —— U.S. ——, 106 S.Ct. 2537 (1986). According to Petitioner, the jury award of $900,000 was excessive,[29] and the allegedly im-

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[29] Petitioner suggests in its "Questions Presented" that the $900,000 verdict was not due to the merits of the case, but resulted

proper jury instructions "played a direct and significant role in the amount of the award." (Ptn. at 27).

A. Petitioner Proffered The Very Instructions At Trial Which It Now Seeks To Contest, Did Not Object To The Instructions At Trial And Did Not Challenge Them In Its Assignment Of Errors To The Court Below.

Before even addressing the merits of Petitioner's argument, Respondent submits that such contentions must fail because they have not been preserved for this Court's consideration. The instructions which Petitioner now attacks were submitted by *Petitioner itself, verbatim,* in its Request for Jury Instructions. (Resp. App. at 21a).

As this Court has recently stated, "there would be considerable prudential objection to reversing a judgment because of the instructions that the Petitioner accepted, *and itself requested.*" *Kibbe,* 107 S.Ct. at 1116 (emphasis added). Petitioner never voiced any objection to the instructions in question. On the contrary, only co-defendant McDaniel's counsel addressed the instruction at all, stating that he was "confused" about the proper way to instruct the jury on the damages available for constitutional violations, and sought the trial court's guidance.

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from "unfair" restrictions placed upon the Petitioner's defense, such as holding the second trial in another city, and excluding evidence on the issue of liability. Petitioner does not offer any argument, however, as to why either of these restrictions constituted error. Nor did Petitioner make any such argument in the court below. Thus, the Petitioner has waived the right to present these questions in this Petition. *See U.S. v. Spector,* 343 U.S. 169 (1953).

To place Petitioner's assertions in proper context, however, the Court should be aware that both Petitioner and Respondent requested a new trial following the first jury's verdict of $1,000.00. Respondent sought a new trial limited to the issue of compensatory damages. After an extensive and exhaustive analysis of the applicable facts and case law, the trial court granted Respondent's motion. (Ptn. App. at 62a-86a). The Fourth Circuit Court upheld this decision, finding ". . . to have proceeded otherwise may well have been an abuse of discretion here." (Ptn. App. at 38a).

By failing to object to the instructions at trial, Petitioner clearly waived its right to attack them on appeal or challenge them in this Petition. *Youakim v. Miller*, 425 U.S. 231 (1976); F.R.C.P. 51; *Bilancia v. General Motors Corp.*, 438 F.2d 621 (4th Cir. 1976). *See also Skogan v. Dow Chemical*, 375 F.2d 692 (8th Cir. 1967) (A party may not sit idly by and allow trial court to commit error, wait for a verdict and complain only if verdict is unfavorable). In any event, Petitioner did not raise the propriety of the instructions in its assignment of errors to the United States Court of Appeals for the Fourth Circuit, nor did it brief the issue or address it in oral argument. Thus, the issue was not properly before this Court or the lower court. *See Trailmobile Co. v. Whirls*, 331 U.S. 40, 48 (1947); *Brown v. Sielaff*, 474 F.2d 826 (3rd Cir. 1973); *Chicago and West Indiana Rail Company v. Motor Ship Buko Maru*, 505 F.2d 579 (7th Cir. 1974).

B. The Jury Instructions On Sec. 1983 Damages Do Not Offend *Stachura* Because They Preclude Jury Speculation On The Value Of Constitutional Rights And Invite Damages Which Are Proportionate To The Actual Injury Sustained.

Even assuming *arguendo*, Petitioner's argument is properly before this Court, it does not on its merits, warrant a writ of certiorari. The instructions on damages which were given by the trial court are not offensive to the opinion of this Court in *Stachura*.

In *Stachura*, 106 S.Ct. 2537, this Court rejected instructions in a § 1983 action which authorized "a separate award of compensatory damages for violation of constitutional rights" and which invited the jury to speculate upon the "abstract" value of constitutional rights and award a dollar amount for the violation of such constitutional rights.

There are several distinctions between the charge in *Stachura* and the charge in the case at bar:

(a) First of all, the charge in *Stachura*, where there was no physical injury, permitted the jury to determine the value of the violation of a constitutional right and award a dollar amount for said violation. The Court in this case, however, instructed the jury that it could determine the amount of Respondent's damage for a personal injury that resulted from the violation of a constitutional right and award a dollar amount for that damage, as opposed to awarding a dollar amount for the violation of a constitutional right which resulted in the injury, and another dollar amount for the injury also.

(b) Secondly, the Court in this case followed established and well-settled instructions relating to the factors to be considered by the jury in determining the amount of damage resulting from the personal injury sustained by the Respondent. The Court in *Stachura*, on the other hand, had no such well-settled instructions or guidelines to give the jury and allowed them to simply speculate without adequate instruction on the value of something that was totally foreign to the average layman.

(c) Thirdly, unlike *Stachura*, the jury in this case was told it could only award "compensatory damages". The jury in the case at bar was specifically given *five* criteria which it could consider in awarding damages. While the Court in its mandate did list the violation of a constitutional right as a matter for the jury to "take into account", *it at no time invited the jury to speculate* as to such things as to "importance of the right in our system of government, the rule which this right has played in the history of our Republic, [and] the significance of the right and context of the activities which the Plaintiff was engaged in at the time of the violation of the right." *Stachura*, 106 S.Ct. at 2541.

The jury in this case was instructed as follows:

> Damages *may not be based upon speculation, because it is only actual damages*, what the law calls compensatory damages *that are recoverable.* However, you are instructed that damages may be

> awarded for the violation of a constitutional right even though these damages may be difficult to quantitatively measure.

(Resp. App. at 18a.) (Emphasis added).

It was at the specific request of Petitioner that the Court further instructed the jurors that damages could be awarded for a constitutional violation, even though difficult to measure, and that the law clearly recognized the "inherent value of constitutional rights, even though difficult to assess." The trial judge continued by informing the jury that compensatory damages were not limited to actual loss of time or money, but could cover both "mental and physical aspects of injury." The jury was told they could consider the Plaintiff's sterility in determining damages. (Resp. App. at 18a).

The jurors were then instructed that they should apply *five criteria* in determing damages: (1) medical expenses; (2) pain, suffering and mental anguish; (3) scars and disfigurement; (4) loss of part of the body and loss of use of part of the body, and (5) permanent injuries and disabilities. (Resp. App. at 18a-19a). During deliberations, the jurors, by a note delivered to the Court, inquired as to whether they should "list damages in five categories for clarification as to how damages were awarded." The court, *with the concurrence of all parties,* responded by stating, "[N]o, a single figure will suffice."

In short, this case presents issues and facts totally different from those in *Stachura.* In *Stachura* the plaintiff was awarded compensatory damages of $275,000 for the brief suspension of his teaching privileges, *even though he remained on salary during the suspension,* 106 S.Ct. at 2540. Respondent herein, however, suffered injuries which were clearly proportionate to the $900,000 award. Handcuffed and inebriated, Respondent was brutally attacked and deliberately kneed with such force that the urologist who examined the Respondent and surgically removed his shattered testicle testified that he

had examined and treated over 30,000 patients during his career, and that the Respondent's injury was worst of this type he had ever seen. Obviously, this injury caused Respondent, who was rendered permanently sterile, excruciating pain, as well as severe and protracted humiliation and anguish.

Yet Petitioner argues that $900,000 is "by no stretch of the imagination" a proper compensatory award because Respondent's medical expenses were only $2,041.74. (Ptn. at 27). This argument is so blatantly insensitive that it is offensive. Respondent submits that this Court should not dignify such contentions by granting a writ of certiorari.

CONCLUSION

For the foregoing reasons and for the further reason that none of the grounds contemplated by Supreme Court Rule 17.1 are present, Respondent urges the Court to deny the Petition For A Writ Of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

CHARGE TO THE JURY

Dated January 28, 1985

* * * *

[9] In a civil action such as this the party asserting a claim has the burden of proving every essential element of his claim by a preponderance of the evidence. This means that the plaintiff has to produce evidence which, considered in the light of all of the evidence in this case, leads you to believe that what the plaintiff contends is more likely true than not. To put it illustratively, if you were to put plaintiff's and defendants' evidence on opposite sides of the scales, plaintiff would have to make the scales tip slightly on his side.

Again, all that the law requires of the plaintiff is that he prove that his contentions are more likely true than not. If the plaintiff fails to meet this burden, the verdict must be for the defendants. But, if this burden is met, your verdict must be for the plaintiff.

Now, Ladies and Gentlemen, you will decide the plaintiff's case in separate phases. The first, as to the defendant McDaniel. And the second, as to the remaining defendants Smith, Dixon, and Dalton, Holman and Johnson as supervisory officials of the Fayetteville Police Department.

Your decision, as to said supervisory officials, will in turn determine the liability, if any, of the City of Fayetteville.

The plaintiff in this case claims damages for per- [10] sonal injuries alleged to have been suffered or sustained by him as the result of the deprivation under color of state and municipal law, statute, custom, practice or usage of a right, privilege and immunity secured to the plaintiff both by the Constitution of the United States

and by an Act of Congress providing for the equal rights of all persons within the jurisdiction of the United States.

Specifically, plaintiff alleges that on November 19, 1983, the defendant Charles D. McDaniel was a duly appointed employed and acting police officer of the City of Fayetteville Police Department. And on that date, within the City of Fayetteville, the defendant Charles D. McDaniel, while acting as a police officer under color of the laws of the State of North Carolina and the ordinances of the City of Fayetteville and the rules and regulations of the Police Department of the City of Fayetteville, did knowingly subject the plaintiff to the deprivation of rights and privileges secured and protected to him by the Constitution and laws of the United States, namely the right of physical integrity to be free from unlawful detention and to be properly cared for and treated as established by the substantive due process provisions of the Fourteenth Amendment, and further the right to be free from unreasonable seizure as established by the Fourth Amendment and the Fourteenth Amendment.

The plaintiff alleges that this deprivation of rights [11] and privileges occurred when the defendant McDaniel assaulted the plaintiff in the Assembly Room of the Cumberland County Law Enforcement Center located in the City of Fayetteville, without just cause or excuse, by kneeing the plaintiff in the testicles, thus resulting in serious and permanent bodily injury and disfigurement to include permanent loss of his right testicle and permanent irreversible sterility, all to plaintiff's damage, which plaintiff alleges to be in the sum of 7.5 Million Dollars.

The plaintiff further alleges that the acts of the defendant Charles D. McDaniel were maliciously and wantonly executed. And by reason thereof, plaintiff alleges enttilement to an award of 2.5 Million Dollars as puni-

tive and exemplary damages from McDaniel, in addition to actual or compensatory damages claimed by plaintiff.

The plaintiff further alleges that the actions of the defendant McDaniel in assaulting him on November 19, 1983 were taken pursuant to, consistent with, under color of and proximately resulted from de facto policy practices, customs or procedures caused, maintained, tacitly encouraged condoned by one or more supervisory officials of the defendant City of Fayetteville.

I shall further instruct you as to the meaning of de facto later in these instructions.

The plaintiff alleges that the supervisory defendants namely John P. Smith, as City Manager; Daniel K. Dixon, Chief [12] of Police; Command Sergeant William Dalton; Command Sergeant Roger T. Holman; and Internal Affairs Sergeant William Johnson, all acting under color of state and municipal law and pursuant to the authority of their offices within the defendant and pursuant to the authority of their offices with the defendant City of Fayetteville, by their respective actions or inaction, proximately caused the defendant Charles D. McDaniel to assault the plaintiff on November 19, 1983.

Therefore, the plaintiff seeks to hold these defendants, and through one or more of them, the City of Fayetteville, jointly liable with the defendant Charles D. McDaniel for his actual or compensatory damages.

The defendants Smith, Dixon, Dalton, Holman and Johnson have been joined in this matter only in their capacity as duly authorized representatives of the defendant City of Fayettevill.e Thus, any judgment rendered against these representative defendants will not subject any of them to individual liability for payment thereof.

Allowing municipal officials to be sued in their representative capacities is simply another means of hold-

ing a municipal authority responsible for the acts of its officials, while at the same time allowing the jury to affix responsibility toward particular public officials.

Thus, the plaintiff seeks to hold these supervisory defendants jointly liable in their representative capacities [13] with the defendant Charles D. McDaniel for plaintiff's actual or compensatory damages.

Our law does not allow punitive damages to be assessed against either a municipal corporation or municipal officers sued in their representative capacity. Therefore, you shall consider the claim for punitive damages only as to the defendant Charles D. McDaniel. I will instruct you as to the law of damages later in these instructions.

Now, Ladies and Gentlemen, as I stated to you earlier, plaintiff in this case claims damages for personal injuries alleged to have been suffered or sustained by him as a result of the deprivation under color of state law of rights, privileges and immunities secured to the plaintiff, both by the Constitution of the United States and by an Act of Congress providing for the equal rights to all persons within the jurisdiction of the United States.

I instruct you that Section 1983 of Title 42 of the United States Code provides that any citizen of this federal district may seek redress in this court by way of damages against any person or persons who, under color of any law, statute, ordinance, regulation or custom knowingly subjects such citizen to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States.

The statute just outlined for you comprises one of [14] the Civil Rights Acts enacted by the Congress for the express purpose of enforcing the provisions of the Fourteenth Amendment to the Constitution of the United States. That Fourteenth Amendment provides that no

person shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

In order to prove his claim against the defendant Charles D. McDaniel plaintiff must prove to you by a preponderance of the evidence in the case the following four facts: First, that the defendant Charles D. McDaniel on November 19, 1983 knowingly assaulted the plaintiff Henry Z. Spell in the basement of the Cumberland County Law Enforcement Center by kneeing him in the testicles.

Second, that the defendant Charles D. McDaniel at the time of this assault acted under the color of his authority as a police officer of the City of Fayetteville, North Carolina as given to him under the laws of the State of North Carolina, the municipal ordinances of the City of Fayetteville, and the rules and regulations of the Fayetteville Police Department.

Third, that the defendant Charles D. McDaniel's acts and conduct at the time of said assault deprived the plaintiff of his federal constitutional right not to be denied his [15] liberty or property without due process of law, as that phrase is defined and explained in these instructions.

And fourth, that the defendant Charles D. McDaniel's acts and conduct were the proximate cause of the injury and consequent damages to the plaintiff.

Now, with regard to the first element, an act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason. It is not necessary to find that the defendant Charles D. McDaniel had any specific intent to deprive the plaintiff of his civil rights in order to find in favor of the plaintiff.

The plaintiff is entitled to relief if the defendant Charles D. McDaniel knowingly acted in a manner which resulted in a violation of the plaintiff's rights.

I further instruct you that acts are done under color or authority of a statute not only when the state officials act within the bounds or limits of their lawful authority but, also when such officers act without or beyond the bounds of their lawful authority.

In this case it is not disputed by the defendants that the defendant Charles D. McDaniel acted under the color of state law so no further proof of the second element of plaintiff's claim against defendant McDaniel is necessary. I therefore instruct you that as a matter of law defendant McDaniel was acting under the color of state law at the time of [16] the alleged assault on November 19, 1983.

The third element of plaintiff's claim against defendant McDaniel is that the alleged assault by McDaniel deprived plaintiff of his liberty without due process of law. To be deprived of one's liberty without due process of law means to be deprived of such rights without authority of law. Before you can determine then whether or not the plaintiff was deprived by the defendant Charles D. McDaniel of any liberty due under the Federal Constitution without due process of law, you must first determine from a preponderance of the evidence whether the defendant Charles D. McDaniel knowingly did the act alleged.

In the context of the present case, you are instructed as a matter of law that under the Constitution of the United States every citizen has the right to liberty and the right to be properly treated while in lawful detention or restraint.

The plaintiff, even though a lawfully detained person, has other liberties among which was the liberty to be free from unlawful attack upon his physical integrity. It has always been the policy of the law to protect the physical

integrity of every person from unauthorized violation or interference no matter who they might be and no matter what they might have done. Thus, the plaintiff even while lawfully detained by the defendant Charles D. McDaniel had the right under the United States Constitution not to be deprived of this remaining liberty involving the physical integrity of his person without [17] due process of law.

In that the defendant Charles D. McDaniel denies that he struck and kneed the plaintiff in the testicles at any time or for any legitimate or justified reason and further denies striking the plaintiff at all, I instruct you that if you find that the defendant Charles D. McDaniel on November 19, 1983 assaulted the plaintiff Henry Z. Spell in the Police Assembly Room of the Cumberland County Law Enforcement Center by kneeing him in the testicles, you need not concern yourself with the third element. That is, the issue of whether such action deprived the plaintiff of a right secured to him by the Federal Constitution. Because such action, in and of itself, would constitute a violation of the plaintiff's constitutional right to physical integrity as a matter of law.

Now, Ladies and Gentlemen, as to the fourth element, injury or damage is proximately caused by an act or a failure to act whenever it appears from the evidence that the act or failure to act in the natural or probable course of events brought about the injury or damage and the injury or damage was of such a character that an ordinarily prudent person could reasonably foresee it as being likely to occur.

This does not mean that the law recognizes only one proximate cause for an injury or damage. On the contrary, many factors or things or the conduct of two or more persons may operate at the same time, either independently or together, to [18] cause injury or damage. In such a case, each may be said to be a proximate cause.

And so, Members of the Jury, if after considering the evidence in this case, you should find by a preponderance of the evidence that on November 19, 1983 first, the defendant Charles D. McDaniel knowingly assaulted the plaintiff Henry Z. Spell in the basement of the Law Enforcement Center by kneeing him in the testicles; and second, the defendant Charles D. McDaniel's acts and conduct were the proximate cause of the injury and consequent damages to the plaintiff; then, because elements two and three would be established at that point as a matter of law, it would be your duty to find for the plaintiff on this first issue. If you do not so find by a preponderance of the evidence, then it would be your duty to find for the defendant McDaniel. I instruct you that your verdict must be unanimous.

Therefore, as to the question of the liability of defendant Charles D. McDaniel to the plaintiff Henry Z. Spell, you shall be submitted one issue for your consideration which is, on November 19, 1983, did the defendant Charles D. McDaniel assault the plaintiff Henry Z. Spell by kneeing him in the testicles proximately causing injury or damage to the said Henry Z. Spell.

If you answer this issue, no, you shall return to the courtroom for that will constitute a final verdict in this [19] case.

If you answer this issue, yes, you should go on to consider the remaining issues to be submitted to you.

If your answer to the first issue is yes, you will then proceed to issue number two and consider the liability of the supervisory defendants and through them the defendant City of Fayetteville.

In this respect, I charge you that the law provides that local governmental bodies such as the defendant City of Fayetteville are held jointly liable for money damages where it is alleged and found by a preponderance of the

evidence that the unconstitutional action of its employees, servants or agents proximately resulted from de facto regulations, policies, customs or practices of the defendant city, or an agency of the city, such as in this case, the Fayetteville Police Department.

The law further allows municipal or city officials to be held liable for constitutional violations which proximately result from their actions or inactions which constitute gross negligence or willful indifference in the performance of their official duties as representatives of a city such as the defendant City of Fayetteville.

I further charge you that this is so even if those officials use good faith in the performance of their duties. Thus, if their actions or inactions in carrying out their [20] official duties amount to gross negligence in allowing a de facto or official policy to exist or wilful indifference thereto, these officials may be held liable for constitutional violations proximately resulting from the existence of such de facto policy, even though they acted in good faith and with the best of intentions in the performance of their duties.

Thus, in the present case, the plaintiff seeks to hold the defendants City Manager, John Smith; Police Chief, Daniel K. Dixon; Command Sergeant William Dalton; Command Sergeant Roger Holman and Sergeant William Johnson, respectively, and through one or more of them, the City of Fayetteville jointly liable with the defendant Charles D. McDaniel for actions and inactions taken by them in their representative capacities which plaintiff alleges proximately resulted in the assault upon his person by the defendant Charles D. McDaniel. I may refer to these defandants as representative or supervisory defendants.

In this respect, you are instructed that by joining these supervisory defendants in this action only in their official capacities as representative municipal officials of the de-

fendant City of Fayetteville, plaintiff does not seek to impose individual financial liability upon these defendants. Rather, this procedure provides simply a means of seeking liability against the defendant city. Because under the law a verdict against a supervisory defendant in his representative [21] capacity will be treated as a judgment against the defendant City.

However, by these means, the plaintiff seeks to hold liable those whose edicts, acts or omissions he contends may fairly be said to cause, maintain, tacitly encourage or condone the official or de facto policy, custom, practice or procedure of the defendant City of Fayetteville, so as to specifically affix accountability for the results of their respective actions or inactions.

Members of the Jury, in this respect I specifically charge you that personal participation by a supervisory defendant in any assault upon the plaintiff by the defendant Charles D. McDaniel is not required for you to hold such supervisory defendant liable in his representative capacity. The issue, rather, is whether such a supervisory defendant did something or failed to do something which he ought to have done which proximately resulted in the assault of the plaintiff Spell by the defendant McDaniel.

Thus, as to each representative or supervisory defendant his liability may be established by the plaintiff's proving by a preponderance of the evidence the following four elements.

First, that the assault by the defendant Charles D. McDaniel upon the plaintiff Henry Z. Spell proximately resulted from a de facto policy, custom, practice or procedure.

[22] And second, the representative defendant of the city developed, caused or maintained such policy, practice, custom or procedure. Or in the alternative, the representative defendant was aware of or reasonably should

have been aware of the existence of such a policy, practice, procedure or custom and that he, the representative defendant, had the authority to rectify, nullify or render ineffective such policy, but in conformity with such de facto policy, practice, procedure or custom, he failed to act within the scope of his authority to do so.

And third, such action or failure to act amounted to gross negligence or deliberate indifference to the constitutional rights of others.

And fourth, such action is establishing or causing the existence of such a policy, practice, procedure or custom or in failing to nullify or render it ineffective set in motion a series of acts by others which the representative defendant reasonably should have foreseen would cause his subordinates, including defendant McDaniel, to in fact inflict constitutional injury upon the citizens of the City of Fayetteville or this Federal District.

This fourth element, Members of the Jury, is simply a further definition of proximate cause under these circumstances.

In summary, each of the representative defendants [23] and through them the City of Fayetteville may be held liable jointly with the defendant McDaniel, if you find that such representative defendants' own action or, alternatively inaction, within the scope of the authority of his official capacity amounted to gross negligence or deliberate indifference to the constitutional rights of others, and it proximately resulted in an assault on the plaintiff Spell by the defendant McDaniel.

Official policy directives, regulations or ordinances give rise to municipal liability under 42 United States Code, Section 1983 if such policies proximately lead to a deprivation of constitutional rights. In addition, less than formal municipal conduct can also give rise to the city's liabilities.

Cities like the defendant City of Fayetteville are equally liable for what the law considers de facto or in fact practices, customs or policies caused, maintained, tacitly encouraged or condoned by their supervisory personnel and which proximately cause a constitutional deprivation. This is so even though these policies, practices and customs have at no time received formal approval through the local government's decision making channels.

Thus, informal actions, if they reflect a general and persistent pattern in practice, may be so common and well settled as to constitute a custom or pattern of official misconduct, that such misconduct may then fairly be said to [24] represent a municipal policy existing in fact. That is to say de facto policy.

If such a de facto policy expressly or tacitly encourages conduct depriving individuals of their constitutional rights, it is sufficient to impose liability upon the city's responsible supervisory personnel and through them, upon the defendant city itself.

Members of the Jury, the term tacit encouragement—by the term tacit encouragement, the law means encouragement expressed or conveyed without words or speech. That is, encouragement implied or inferred from the actions or inactions of a person of authority. In this regard, you should keep in mind that a single isolated act is insufficient to establish a de facto policy. By the same token, the citizens of a municipality do not have to endure an overly widespread or unduly prolonged pattern of past misconduct before municipal liability can be found under 42 United States Code, Section 1983.

In addition, Members of the Jury, a de facto policy can be inferred from the city's omissions as well as from its affirmative acts. If you find these omissions constitute tacit authorization of or deliberate indifference to constitutional injuries. More specifically, I instruct you that where a senior person in a police department has knowl-

edge of a pattern of constitutionally offensive acts by his subordinates, but fails to take remedial steps within the scope of his authority, [25] the city may be held liable for a subsequent violation, if you find the supervisory official's actions or inactions amounted to a deliberate indifference or tacit authorization of the offensive acts.

In determining the question of the existence of such de facto policies, practices, customs or procedures, and therefore, the liability of the representative defendants in their official capacities and through one or more of them, the liability of the city, you should consider insofar as they relate thereto such matters as the nature and sufficiency of the training given to Fayetteville Police Officers, whether or not Fayetteville Police Officer candidates were properly evaluated for their respective jobs, whether or not Fayetteville Police officials condoned or encouraged the use of unnecessary or excessive force by its officers, whether or not the City of Fayetteville, through its police officials, properly investigated allegations of improper police conduct, whether or not officially adopted policies and regulations of the City of Fayetteville Police Department were regularly and properly enforced, whether or not disciplinary procedures were uniformly and fairly applied and administered, and the manner in which police officers who reported improper acts by other police officials were treated by supervisory officials within the Fayetteville Police Department.

I remind you that in order for the plaintiff to prove [26] his claim against a representative defendant, he must prove by a preponderance of the evidence that the de facto policy caused, maintained, tacitly encouraged or condoned by him proximately caused the plaintiff's injury.

And so, Members of the Jury, if after considering the evidence in this case, you should find by a proponderance of the evidence that on November 19, 1983 with respect to each representative or supervisory defendant independ-

ently first, that the assault by the defendant Charles D. McDaniel upon the plaintiff Henry Z. Spell proximately resulted from a de facto policy, custom, practice or procedure; and second, that the representative or supervisory defendant developed, caused or maintained such policy, practice, procedure or custom; or in the alternative that the representative or supervisory defendant was aware or reasonably should have been aware of the existence of such a policy, practice, procedure or custom, and the representative or supervisory defendant had the authority to rectify, nullify or render ineffective such policy, but in conformity with such de facto policy, practice, procedure or custom he failed to act within the scope of his authority to do so; and third, such action or failure to act amounted to gross negligence or deliberate indifference to the constitutional rights of others; and fourth, such action in establishing or causing the existence of such a policy, practice, procedure or custom or failure to act to render it ineffective [27] set in motion a series of acts by others which the representative defendant reasonably should have foreseen would cause his subordinates, including defendant McDaniel, to in fact inflict constitutional injury upon the citizens of the City of Fayetteville or of this Federal District, then it would be your duty to find for the plaintiff on this second issue considering the liability of each supervisory defendant independently.

If you do not so find by a preponderance of the evidence, then it would be your duty to find for the individual defendant, again considering evidence as to each defendant independently.

Your verdict as to each defendant must be unanimous.

Thus, with respect to each supervisory defendant, the second issue for your consideration is whether the assault by the defendant Charles D. McDaniel on the plaintiff Henry Z. Spell proximately resulted from a de facto

policy, custom, practice or procedure which the representative or supervisory defendant either developed, maintained or caused or was aware of or reasonably should have been aware of and which the representative defendant had the authority to rectify, nullify or render ineffective, but in conformity with such policy, practice, procedure or custom the defendant failed within the scope of his authority to do so, and whether such action or failure to act amounted to gross negligence or deliberate indifference to the constitutional rights of others. This [28] issue shall be answered yes or no as to each supervisory defendant.

* * * *

[34] Each of you must decide the case for yourself, but only after an impartial consideration of all the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and to change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. Remember at all times that you are not partisans, you are judges. You are the judges of the facts and your sole interest is to seek truth from the evidence in the case.

Members of the Jury, when you retire to the jury room to deliberate on your verdict, the first order of business should be the selection of one of your number to serve as your foreman or forelady who will preside over your deliberations and act as your spokesman here in court.

Now, when you go you will be given a verdict form to be completed in the manner in which I have indicated in my instructions. The verdict form contains four issues.

The first issue reads: On November 19, 1983, did the defendant Charles D. McDaniel assault the plaintiff

Henry Z. Spell by kneeing him in the testicles proximately causing injury or damage to Henry Z. Spell?

Following that issue there is the answers, yes or no. [35] And you should mark one of those to indicate your decision in this regard.

Members of the Jury, if you answer "no" to the first issue, you shall inform the Marshal and return to the courtroom, for that will constitute a final verdict in favor of the defendants.

If you answer "yes" to this issue, you shall go on to consider and decide the remaining three issues.

The second issue reads as follows: Did the assault by the defendant Charles D. McDaniel on the plaintiff Henry Z. Spell proximately result from a de facto policy, custom, practice or procedure which a representative or supervisory defendant either developed, maintained or caused or was aware of or reasonably should have been aware of and which the representative defendant had the authority to rectify, nullify, or render ineffective, but in conformity with such policy, practice or procedure the defendant failed to act within the scope of his authority to do so, and did such action or failure to act amount to gross negligence or deliberate indifference to the constitutional rights of others?

Following this, there is a place to indicate either, yes or no, your decision as it relates to each of the individual supervisory defendants.

The third issue reads: What amount of compensatory damages is plaintiff entitled to recover from the defendants?

[36] You should respond to this issue if you answered "yes" to the first issue alone, or "yes" to the first issue and "yes" on the second issue as to any supervisory defendant.

The fourth issue for you to decide is: What amount of punitive damages, if any, is plaintiff entitled to recover from defendant Charles D. McDaniel individually?

As I have indicated earlier, this issue should not be reached unless an award of compensatory damages has been given to the plaintiff.

* * * *

CHARGE TO THE JURY

Dated April 2, 1985

* * * *

[14] In considering the issue of damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the plaintiff's damages and injuries.

Of course, as in any case, the fact that I instruct you on the issue of damages should not be interpreted as an indication by the Court of any amount of damages to be received by the plaintiff.

Damages may not be based on speculation, because it is only actual damages, what the law calls compensatory damages that are recoverable. However, you are instructed that damages may be awarded for violation of a constitutional right even though these damages may be difficult to quantitatively measure.

The law clearly recognizes the inherent value of constitutional rights, even though difficult to assess. Compensatory damages are not restricted to actual loss of time or money. They cover both the mental and physical aspects of injury, tangible and intangible. They are an attempt to restore the plaintiff, that is to say, to make the plaintiff whole or as whole as he was immediately prior to the injury.

Thus, in determining damages, you may consider the plaintiff's inability to father additional children as a result of the assault committed upon him.

[15] A person who suffers personal injury proximately caused by the defendant is entitled to recover in a lump sum monetary award the present worth of all damages, past, present and prospective, which naturally and proximately result from such an injury. Such damages include medical expenses, an award for pain and suffering and

mental anguish, an award for scars and disfigurement, an award for loss of part of the body and loss of use of part of the body, and an award for permanent injuries and disabilities sustained.

I will now explain the law of damages it relates to each of these things.

Medical expenses include the actual amount which you find by the greater weight of the evidence to have been incurred by the plaintiff as a proximate result of defendants' actions for hospital, doctors, drug bills and other medical expenses.

You should further award the plaintiff a sum which will compensate him reasonably for any pain, suffering and mental anguish already suffered by him, and proximately resulting from the injury in question, and for any pain, suffering and mental anguish which you find from the evidence in the case plaintiff is reasonably certain to suffer in the future from the same cause. There is no fixed formula for evaluating pain and suffering. You must determine what is fair compensation by applying logic and common sense to the evidence.

[16] In addition, you may properly consider the evidence introduced in regard to the loss of the physical presence of his right testicle and the resulting disfigurement theretrom. In awarding damages to the plaintiff in regard to disfigurement, you should consider the reasonable compensation for actual physical and mental pain and suffering past, present and prospective. But the award of prospective damages should be made as to the present cash value or the present worth of said damages. And in this case, you are instructed to accept as fact that the plaintiff lost his right testicle, which has rendered him permanently and irreversibly sterile. That is to be considered by you in determining what is fair compensation for those elements of damages which will continue throughout the plaintiff's life. You, the jury, should deter-

mine what is fair compensation for the handicap resulting from such loss. In this respect, you should award the plaintiff, as damages, such amount of money as you find justified by the evidence for the fact that he has been rendered permanently and irreversibly sterile by the action of the defendants.

I also instruct you that since the first jury in this case determined the defendants are liable to the plaintiff for damages, plaintiff is entitled to an award of a reasonable attorney's fee, pursuant to the United States Code Sections 1983 and 1988. However, you should not consider in your deliberations whether or not the plaintiff's attorneys will receive just [17] compensation for their work. This Court, by order, will so award plaintiff's attorneys and such award will be independent of your verdict.

And so, Members of the Jury, in determining how much money will fully and adequately compensate the plaintiff for his damages in this case, I instruct you that you should take into account the following elements and award plaintiff such amount as you find justified by a preponderance of the evidence: medical expenses; pain, suffering and mental anguish; scars and disfigurement; loss of part of the body; and loss of use of part of the body; permanent injuries and disability; and violation of constitutional rights.

Finally, I instruct you that your verdict must represent a considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to it. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement, if you can do without violence to your individual judgment.

* * * *

DEFENDANT'S REQUEST FOR JURY INSTRUCTIONS

Dated March 28, 1985

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* * * In considering the issue of damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all the Plaintiff's damages and injuries. Of course, the fact that I instruct you on the issue of damages should not be interpreted as an indication by the court of any amount of damages to be received by the Plaintiff.

Damages may not be based on speculation because it is only actual damages, what the law calls compensatory damages that are recoverable in this case. However, you are instructed that damages may be awarded for violation of a constitutional right even though these damages may be difficult to quantitatively measure. The law clearly recognizes the inherit value of constitutional rights, even though difficult to assess.